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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

*ADMINISTRATIVE APPEALS OFFICE*

*425 Eye Street N.W.*
*ULLB, 3rd Floor*
*Washington, D.C. 20536*

[redacted]

File: [redacted] Office: LOS ANGELES, CA Date: APR 17 2003

IN RE: Applicant: [redacted]

Application: Application for Waiver of Grounds of Inadmissibility under Section 212(i) of the Immigration and Nationality Act, 8 U.S.C. § 1182(i)

ON BEHALF OF APPLICANT:

[redacted]

PUBLIC COPY

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the District Director, Los Angeles, California, and a subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The AAO affirmed that decision on a motion to reopen. The matter is now before the AAO on a second motion to reopen. The motion will be granted and the decision dismissing the appeal will be reaffirmed. The application will be denied.

The applicant is a native and citizen of the Philippines who was found to be inadmissible to the United States under section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), for having sought to procure a benefit by fraud or willful misrepresentation. The applicant is married to a United States citizen and is the beneficiary of an approved petition for alien relative. She seeks the above waiver in order to remain in the United States and reside with her spouse.

The district director found that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the application accordingly. The AAO affirmed that decision on appeal and on a first motion to reopen.

On first motion, counsel stated that there was new information and/or evidence that should be considered, as well as other matters needing clarification in connection with the applicant's case. Although counsel's brief indicated that several additional documents were being submitted on motion, the only document received was a psychological evaluation of the applicant's spouse dated February 19, 2001.

On second motion, counsel submits a brief and an affidavit from one of the applicant's distant relatives. Counsel argues that the applicant had no intention of misrepresenting her former husband's demise, the Bureau is estopped from raising the issue of inadmissibility, and there is no need for the applicant to apply for a waiver of inadmissibility.

The record reflects that the applicant was initially admitted to the United States in 1991 as a temporary visitor for pleasure for a period of six months. She remained longer than authorized and in July 1993 married a United States citizen. In December 1993, she filed an application for adjustment of status to lawful permanent residence based on that marriage. In connection with her application for adjustment of status, the applicant submitted a fraudulent death certificate for a prior spouse and stated under oath that her prior spouse was deceased when, in fact, he was still living. The applicant was determined by a Service, now Bureau, officer to be inadmissible to the United States for having sought to procure a benefit by fraud or willful misrepresentation.

In order to validate her current marriage, the applicant

subsequently obtained a divorce from her prior spouse and remarried her current, U.S. citizen spouse in 1995. The petition for alien relative filed on her behalf by her U.S. citizen spouse was amended and approved in 1999. On first motion, counsel asserted that the applicant's inadmissibility under section 212(a)(6)(c)(i) had been rendered moot and academic, if not tacitly waived, because the petition for alien relative filed on the applicant's behalf was amended subsequent to its submission and was ultimately approved by the Bureau. On second motion, counsel reasserts that the Bureau is estopped from raising anew the issue of inadmissibility.

The AAO, like the Board of Immigration Appeals, is without authority to apply the doctrine of equitable estoppel so as to preclude a component part of the Bureau from undertaking a lawful course of action that it is empowered to pursue by statute or regulation. See *Matter of Hernandez-Puente*, 20 I&N Dec. 335, 338 (BIA 1991). Estoppel is an equitable form of relief that is available only through the courts. The jurisdiction of the AAO is limited to that authority specifically granted through regulations at 8 C.F.R. § 103.1(f)(3)(iii). Accordingly, the Bureau has no authority to address the petitioner's estoppel claim.

The approval of the petition filed on the applicant's behalf does not negate the Bureau's finding that the applicant sought to procure a benefit by fraud or willful misrepresentation when applying for a benefit under section 245A of the Act. The Bureau is not required to approve applications or petitions where eligibility has not been demonstrated. Each petition must be adjudicated based on the evidence contained in the record. *Sussex Engineering, Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987); cert denied 485 U.S. 1008 (1988); *Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 597 (BIA 1988). Additionally, an unpublished decision carries no precedential weight. *See Chan v. Reno*, 113 F3d 1068, 1073 (9th Cir. 1997). As the Ninth Circuit says, "[U]npublished precedent is a dubious basis for demonstrating the type of inconsistency which would warrant rejection of deference."

On second motion, counsel also asserts that the applicant did not "willfully" misrepresent a material fact and submits an affidavit from a distant relative of the applicant's explaining that he obtained the fraudulent death certificate on her behalf. The record, however, reflects that the applicant sought to procure a benefit, adjustment of status, by *both* fraud *and* willful misrepresentation. The applicant did not advise her current spouse of her prior marriage and its existence was not initially reflected on the visa petition filed by him on her behalf. At her adjustment of status interview, the applicant stated under oath that her first marriage was terminated due to the death of her prior spouse. She subsequently submitted the fraudulent death certificate. After the interview and during the same period of time that it took the Bureau to authenticate the fraudulent death certificate, the applicant then proceeded to obtain a divorce from her first husband and remarried her current spouse. At no time during her adjustment

of status interview did the applicant advise the Service that the termination of her prior marriage through death was in question. Counsel's argument that the applicant is not inadmissible because she did not knowingly and willfully intend to submit a fraudulent document is not persuasive.

Section 212(a) of the Act states:

> CLASSES OF ALIENS INELIGIBLE FOR VISAS OR ADMISSION.- Except as otherwise provided in this Act, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:
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> * * *
>
> (6) ILLEGAL ENTRANTS AND IMMIGRATION VIOLATORS.-
>
> * * *
>
> (C) MISREPRESENTATION.-
>
> (i) IN GENERAL.-Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

Section 212(i) of the Act states:

> ADMISSION OF IMMIGRANT INADMISSIBLE FOR FRAUD OR WILLFUL MISREPRESENTATION OF MATERIAL FACT.-
>
> (1) The Attorney General may, in the discretion of the Attorney General, waive the application of clause (i) of subsection (a)(6)(C) in the case of an alien who is the spouse, son, or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien.
>
> (2) No court shall have jurisdiction to review a decision or action of the Attorney General regarding a waiver under paragraph (1).

Sections 212(a)(6)(C) and 212(i) of the Act were amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub L. 104-208, 110 Stat. 3009. There is no longer any alternative provision for waiver of a section 212(a)(6)(C)(i)

violation due to passage of time. In the absence of explicit statutory direction, an applicant's eligibility is determined under the statute in effect at the time his or her application is finally considered. See *Matter of Cervantes-Garcia*, 22 I&N Dec. 560 (BIA 1999).

If an amendment makes the statute more restrictive after the application is filed, the eligibility is determined under the terms of the amendment. Conversely, if the amendment makes the statute more generous, the application must be considered by more generous terms. *Matter of George and Lopez-Alvarez*, 11 I&N Dec. 419 (BIA 1965); *Matter of Leveque*, 12 I&N Dec. 633 (BIA 1968).

Section 212(i) of the Act provides that a waiver of the bar to admission resulting from section 212(a)(6)(C) of the Act is dependent first upon a showing that the bar imposes an extreme hardship on a qualifying family member. Although extreme hardship is a requirement for section 212(i) relief, once established, it is but one favorable discretionary factor to be considered. *See Matter of Mendez*, 21 I&N Dec. 296 (BIA 1996).

In *Matter of Cervantes-Gonzalez, supra*, the Board of Immigration Appeals (BIA) stipulated that the factors deemed relevant in determining whether an alien has established extreme hardship pursuant to section 212(i) of the Act include, but are not limited to, the following: the presence of a lawful permanent resident or United States citizen spouse or parent in this country; the qualifying relative's family ties outside the United States; the conditions in the country or countries to which the qualifying relative would relocate and the extent of the qualifying relative's ties in such countries; the financial impact of departure from this country; and finally, significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate.

The evaluation of the applicant's spouse submitted on first motion indicates that he feels depressed, is distraught and conflicted about his current situation and finds it inconceivable that he must choose between remaining in the United States separated from the applicant or relocating with her abroad. The evaluation reports that the spouse was committed to a mental hospital in 1981 and diagnosed as Manic Depressive. The spouse states that he was also an alcoholic and "on prescription drugs" prior to his marriage to the applicant. He fears that without the applicant's encouragement and support, he may "fall off the wagon." The evaluation concludes that the applicant's spouse is suffering emotionally, mentally, physically, psychologically, and spiritually and recommends that he not be placed in a position in which he will be forced to choose between his wife and his country.

It is noted that the applicant's treatment for Manic Depression allegedly occurred 20 years ago. No reference to that event, or to

his alcoholism, was submitted with the initial waiver application or with the initial appeal and no evidence of his claimed history of psychiatric problems and hospitalization has been submitted. Furthermore, there is no evidence indicating that the applicant's emotional condition is a significant condition of health such that he has required continued psychiatric treatment and/or medication.

In *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996), the court stated that "extreme hardship" is hardship that is unusual or beyond that which would normally be expected upon deportation. The common results of deportation are insufficient to prove extreme hardship. *See Hassan v. INS*, 927 F.2d 465 (9th Cir. 1991). The uprooting of family and separation from friends does not necessarily amount to extreme hardship but rather represents the type of inconvenience and hardship experienced by the families of most aliens being deported. *See Shooshtary v. INS*, 39 F.3d 1049 (9th Cir. 1994).

A review of the factors presented, and the aggregate effect of those factors, indicates that the applicant's spouse is suffering hardship due to separation. The applicant has failed, however, to show that her spouse would suffer hardship that reaches the level of extreme as envisioned by Congress if the applicant were removed from the United States. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether she merits a waiver as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility under section 212(i) of the Act, the burden of proving eligibility remains entirely with the applicant. *See Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957). Here, the applicant has not met that burden. Accordingly, the prior orders dismissing the appeal will be reaffirmed. The application will be denied.

**ORDER:** The AAO's orders dated January 31, 2001 and July 20, 2001 are reaffirmed. The application is denied.